

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

DEMETRIUS BROWN,)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION NO. 04-379E
)	
U.S. JUSTICE DEPARTMENT,)	JUDGE MC LAUGHLIN
BUREAU OF PRISONS, FCI MCKEAN)	MAGISTRATE JUDGE BAXTER
WARDEN JOHN J. LAMANNA,)	
REGIONAL DIRECTOR D. SCOTT)	Electronically Filed
DODRILL, MEDICAL DIRECTOR,)	
DIRECTOR HARLEY G. LAPPIN,)	
)	
Defendants.)	

**UNITED STATES' MOTION TO DISMISS
OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rules 12(b)(1), 12(b)(6) and 56(c) of the Federal Rules of Civil Procedure, defendant the United States of America, by its undersigned counsel, file the following Motion to Motion to Dismiss Or, In The Alternative, Motion For Summary Judgment, and in support thereof state as follows:

1. *Pro se* prisoner Demetrius Brown filed a Complaint in the above-captioned action under the provisions of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671 *et seq.* In the Complaint, plaintiff seeks \$10 million in damages for personal injuries allegedly caused by plaintiff's alleged exposure to secondhand smoke during his incarceration at a federal prison located in McKean County, Pennsylvania ("FCI McKean").

2. Plaintiff subsequently filed a Motion to Amend Complaint Correcting Typographical Error and Adding Cure to Jurisdictional Deficiency, which was granted by Order dated May 9, 2005.

3. As defendants, plaintiff has named the U.S. Justice Department, Bureau of Prisons, FCI McKean, Warden John J. LaManna, Regional Director D. Scott Dodrill, Medical Director and Director Harley G. Lappin.¹ The United States of America has filed a motion, however, requesting that it be substituted as defendant for all further proceedings in this case.

4. The Court should, however dismiss plaintiff's FTCA claims for several independent reasons: (i) this action must be limited to only those claims that were fully exhausted in the administrative tort claim; therefore, the Court should dismiss all allegations of retaliation and any claim that conditions at FCI McKean violated the federal Bureau of Prisons' smoking policy that went into effect in March 2004; (ii) all of plaintiff's claims should be dismissed because the alleged actions fall squarely within the discretionary function exception to the FTCA; and (iii) plaintiff fails to state a *prima facie* claim of negligence under Pennsylvania law.

5. Accordingly, the Court should dismiss plaintiff's Complaint and Amended Complaint with prejudice or, in the alternative, enter summary judgment in favor of the United States.

6. The United States' Brief in Support of this Motion, together with accompanying Exhibits 1 through 4, are incorporated in this Motion by reference.

¹Although plaintiff named only an unidentified "Medical Director," the docket sheet has recently been changed to name Newton E. Kendig as that defendant.

WHEREFORE, the United States of America respectfully request that the Court issue an order granting its motion and dismissing plaintiff's Amended Complaint with prejudice or, in the alternative, entering summary judgment in the United States' favor as to all claims contained therein.

A proposed order is attached.

Respectfully submitted,

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Dated: January 3, 2006